

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAR 30 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0150
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
REBECCA SMITH,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700803

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Peter A. Kelly

Palominas
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Rebecca Smith was convicted of felony shoplifting, and sentenced to an enhanced, presumptive, ten-year prison term. On appeal, she argues the court erred in sentencing her as a repetitive offender because the state had not properly alleged the prior convictions in the indictment. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the conviction[.]” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On December 20, 2007, a grand jury indicted Smith for shoplifting, “having committed or been convicted within the past five years of two or more offenses involving burglary, shoplifting, robbery or theft,” a class four felony. The state then filed three notices—on February 27, March 7, and September 10, 2008—alleging Smith previously had been convicted of the following felonies: aggravated assault, fraudulent use of a credit card, and resisting arrest. Smith’s trial began on November 4, 2008, and the jury found her guilty as charged. As a result of the prior convictions, the trial court imposed an enhanced sentence. This appeal followed.

Discussion

¶3 Smith argues her sentence was illegally enhanced because the indictment neither alleged sufficient facts nor cited A.R.S. § 13-604¹ which, she asserts, was

¹Section 13-604 has since been repealed. 2008 Ariz. Sess. Laws, ch. 301, § 15. The version of § 13-604 in effect at the time of the crime—November 17, 2007—was the statute as amended in 2007 Ariz. Sess. Laws, ch. 287, § 1.

required to allow the state to seek an enhanced sentence based on prior felony convictions. The legality of a sentence enhancement is an issue of law, which we review de novo. *See State v. Smith*, 219 Ariz. 132, ¶ 10, 194 P.3d 399, 401 (2008).

¶4 Section 13-604(P) provides for enhanced penalties for repetitive offenders if “the previous conviction . . . is charged in the indictment or information.” 2007 Ariz. Sess. Laws, ch. 287, § 1. Generally, an indictment is sufficient to authorize an enhanced sentence under § 13-604 if it either cites the statute, *State v. Burge*, 167 Ariz. 25, n.4, 804 P.2d 754, 756 n.4 (1990), or specifically alleges facts justifying enhancement under the statute, *see State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980).

¶5 If the prior convictions are not alleged in the indictment, “the court shall allow the allegation of a prior conviction . . . at any time [twenty days or more] prior to the date the case is actually tried.” § 13-604(P); *see also State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985);² *State v. Jones*, 119 Ariz. 479, 480, 581 P.2d 713, 714 (App. 1978). And a “prosecutor may amend an indictment . . . to add an allegation of one or more prior convictions” up to twenty days before trial without re-presenting the case to the grand jury. Ariz. R. Crim. P. 13.5(a); *see also State v. Cons*, 208 Ariz. 409, ¶ 4, 94 P.3d 609, 611 (App. 2004) (charges in indictment and allegations of prior convictions not procedural or substantive equivalents; prosecutor has discretion to add prior conviction allegations); *State v. Deddens ex rel. Cochise County*, 119 Ariz. 156, 157, 579 P.2d 1126,

²The former § 13-604(K), which was considered by the court in *Williams*, was later amended and renumbered as § 13-604(P). *See* 1993 Ariz. Sess. Laws, ch. 255, § 7.

1127 (App. 1978) (grand jury not only way to allege prior conviction for sentence enhancement).

¶6 Further, both § 13-604(P) and constitutional guarantees of due process require the state to file the notice of allegations of the prior convictions before trial to ensure that defendants have proper notice of the punishments they face should they choose to proceed to trial. *State v. Benak*, 199 Ariz. 333, ¶¶ 13-14, 18 P.3d 127, 130-31 (App. 2001); *see also State v. Rodgers*, 134 Ariz. 296, 306-07, 655 P.2d 1348, 1358-59 (App. 1982) (allegations of prior convictions must be made before trial).³ Defendants are denied adequate notice if they are “misled, surprised or deceived in any way by the allegations’ of prior convictions.” *Benak*, 199 Ariz. 333, ¶ 16, 18 P.3d at 131, *quoting State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985).

¶7 The indictment in this case did not refer to § 13-604, nor did it allege specific facts relating to the prior convictions. And, the indictment was never specifically amended. But the state did file three separate notices before trial, with allegations of prior convictions, and each of the notices specifically cited § 13-604 and included the state’s intent to use the priors “for the purpose of sentence enhancement.” This procedure complied in substance with § 13-604(P) and Rule 13.5(a).

¶8 Additionally, because the state timely filed its allegations of prior convictions, Smith had sufficient notice of its intent to seek an enhanced sentence, and

³*Rodgers* also interpreted § 13-604(K), later amended and renumbered as § 13-604(P). *See* 1993 Ariz. Sess. Laws, ch. 255, § 7.

she could not have been “misled, surprised or deceived in any way” as to the state’s intentions. *Benak*, 199 Ariz. 333, ¶ 16, 18 P.3d at 131, *quoting Bayliss*, 146 Ariz. at 219, 704 P.2d at 1364. Moreover, given the state’s power to amend the indictment at its discretion, its choice to call the filing an “allegation of historical prior felony convictions”—rather than an amended indictment—cannot alone be the basis for vacating a sentence when the defendant had adequate notice of the state’s intent to seek enhancement. *Cf. McKaney v. Foreman ex rel. County of Maricopa*, 209 Ariz. 268, ¶ 15, 100 P.3d 18, 21 (2004) (aggravating factors in capital case need not be charged in indictment if defendant receives adequate notice).

¶9 Smith claims, however, the portion of § 13-604(P) that allows the state to file a notice of allegation of prior conviction is only intended to require the prosecutor to inform the defendant of precisely which prior convictions the state intends to rely upon to enhance the sentence. But the plain language of the statute and Rule 13.5 do not support this interpretation. And we consider “the plain language of the statute as the best and most reliable indicator of the statute’s meaning.” *State v. Garcia*, 219 Ariz. 104, ¶ 6, 193 P.3d 798, 800 (App. 2008). Additionally, because the statute is not ambiguous, the rule of lenity, which Smith asserts would require us to construe any such ambiguity in her favor, is not implicated here.

Conclusion

¶10 The trial court did not err in allowing the state to seek an enhanced sentence and in imposing the enhanced term of imprisonment. We therefore affirm Smith's sentence.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge